

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES SANFORD,

CASE NO. CIV S-04-1033 FCD CMK

Plaintiff,

vs.

ORDER

KELLY-MOORE PAINT COMPANY, et al.,

Defendants.

Previously pending on this court's law and motion calendar for June 22, 2005, was plaintiff's motion to compel further answers to interrogatories and production of documents from defendants Kelly- Moore Paint Company, Inc. ("Kelly Moore") and Alexander Fahn and Shirley Fahn ("trustees"), and to allow a site inspection.¹ Having reviewed the pleadings and heard oral argument, the court hereby issues the following order.

First, defendant Kelly Moore contends that plaintiff has not complied with the "meet and confer" requirements under Local Rule 37-251. The court is quite familiar with counsels' hostility towards each other. That being said, it appears that plaintiff's motion to compel was filed on May 2, 2005. Plaintiff's counsel sent a letter also dated May 2, 2005, which claimed to be "an

¹ Plaintiff's counsel refers to defendant Kelly Moore when he appears to mean both defendant Kelly Moore and defendant trustees. Counsel's oversight caused the court undue delay and frustration.

Also, noteworthy is the fact that defendant Alexander Fahn, trustee of the Alexander and Shirley Fahn Trust, passed away on March 3, 2000. Shirley Fahn appears to be the remaining trustee of the Alexander and Shirley Fahn trust.

1 attempt to meet and confer regarding your clients' respective discovery responses." Therefore, the
 2 court finds plaintiff complied with Local Rule 37-251.

3 Next, the court will consider the parties' discovery disputes. Generally, the scope of
 4 discovery under Fed. R. Civ. P. 26(b)(1) is broad. Rule 26(b)(1) permits discovery of any information
 5 "relevant to the subject matter of the action." This phrase "has been construed broadly to encompass
 6 any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue
 7 that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).
 8 Discovery may be sought of relevant information not admissible at trial "if the discovery appears
 9 reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. Rule
 10 26(b)(1). The court, however, may limit discovery if it "...is unreasonably cumulative or
 11 duplicative," or can be obtained from another source "that is more convenient, less burdensome, or
 12 less expensive; or if the party who seeks discovery "has had ample opportunity by discovery ...to
 13 obtain the information sought"; or if the proposed discovery is overly burdensome. Fed. R. Civ. P.
 14 26(b)(2)(i)(ii) and (iii).

15 In light of the broad construction given to discovery requests, the objecting party has
 16 a heavy burden to show why discovery should be denied, by clarifying and explaining its objections,
 17 and providing support therefore. Failure to meet this obligation may result in waiving the
 18 objections. See Harding v. Dana Transport, Inc., 914 F. Supp. 1084, 1102 (D.N.J. 1996); Davis v.
 19 Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981) (objections should be plain and specific); 8 C. Wright
 20 & A. Miller, Federal Practice & Procedure: Civil § 2173 (1994; 1999 Suppl.).²

21 II. BACKGROUND

22 Plaintiff filed this action against defendant Kelly Moore and defendant trustees,
 23

24 ² On June 17, 2005, plaintiff and defendant trustees filed a joint statement. On the same
 25 day, defendant Kelly Moore filed a separate statement. (Docket Nos. 23 and 25.) Defendant
 26 trustees made objections to plaintiff's interrogatories to avoid waiving them if they were not
 27 timely raised. Defendant trustees asserts that they have no reasonable basis to admit or deny
 28 many of plaintiff's contentions because defendant Kelly Moore conducts and controls many of
 the day-to-day operations at the store.

1 alleging numerous violations of the Americans with Disabilities Act (“ADA”). In reviewing the
2 canned complaint and site inspection report, it appears that plaintiff’s complaints are centered on
3 issues involving exterior access, signage, the sales counter, and the restrooms. The court will now
4 discuss the parties’ discovery disagreements.

5 III. INTERROGATORIES

6 As to Interrogatory No. 2, defendant Kelly Moore objects that this interrogatory uses
7 vague and ambiguous terms. Notwithstanding this objection, defendant Kelly Moore agrees to
8 provide supplemental responses as additional information becomes available. Defendant Kelly Moore
9 did not provide any specific reason why it cannot answer this interrogatory, now. Therefore,
10 plaintiff’s motion to compel defendant Kelly Moore to answer Interrogatory No. 2, is granted.

11 Defendant Kelly Moore also asserts that Interrogatory No. 2 is moot because of a
12 stipulation that has been reached concerning the concept of “readily achievable.” The court is not
13 aware that such a stipulation has been reached. (See Joint Statement Re: Discovery Disagreements,
14 Pg. 3.) However, if such a stipulation has been made then plaintiff’s motion to compel defendant
15 Kelly Moore to answer interrogatory No. 2 would be denied as moot.

16 As to Interrogatory No. 2, defendant trustees responds by explaining that they cannot
17 truthfully respond to this request because the store is leased to defendant Kelly Moore. There is no
18 reason why defendant trustees cannot inquire into the feasibility of removing any architectural
19 barriers. Therefore, plaintiff’s motion to compel defendant trustees to answer Interrogatory No. 2 is
20 granted.

21 As to Interrogatory No. 3, defendant Kelly Moore objects that this interrogatory is
22 moot in light of the stipulation regarding “readily achievable.” As previously stated, the court is not
23 aware of that said stipulation was ever reached. Therefore, plaintiff’s motion to compel defendant
24 Kelly Moore to respond to Interrogatory No. 3, is granted.

25 As to Interrogatory No. 3, defendant trustees object arguing that “readily achievable”
26 is vague and ambiguous. Notwithstanding this objection, defendant trustees assert that they cannot
27 truthfully respond to this request because “the information known to them is insufficient.” The court
28 is not persuaded. There is no reason why defendant trustees, owners of the facility leased by Kelly

1 Moore, cannot locate this information. Therefore, plaintiff's motion to compel defendant trustees to
2 respond to Interrogatory No. 3 is granted.

3 As to Interrogatory No. 4, defendants were asked whether they "contended plaintiff
4 was denied full and equal access under federal and state statutes during each visit to the store."
5 Defendant Kelly Moore responded that "it did not know how or under what circumstances plaintiff
6 may have desired to utilize or access the goods and services at the Kelly Moore store." This response
7 is nonsensical. Defendant Kelly Moore could assume plaintiff's reasonable use of the paint store.
8 Therefore, plaintiff's motion to compel defendant Kelly Moore to respond to Interrogatory No. 4 is
9 granted.

10 As to Interrogatory No. 4, defendant trustees joined defendant Kelly Moore's response
11 described above. For the reasons described above, plaintiff's motion to compel defendant trustees
12 to respond to interrogatory No. 4 is granted.

13 As to Interrogatory No. 5, defendant Kelly Moore responded the same as their response
14 in No. 4. However, Interrogatory No. 5 asks about plaintiff's knowledge. Defendant trustees
15 reasonably assert lack of knowledge. Interrogatory No. 5 requires defendants Kelly Moore and
16 trustees to speculate about plaintiff's actual knowledge. Plaintiff's motion to compel defendants
17 Kelly Moore and trustees to respond to Interrogatory No. 5 is denied.

18 As to Interrogatory No. 6, both defendants Kelly Moore and trustees contend that they
19 cannot respond because of lack of knowledge. Interrogatory No. 6 asks about plaintiff's actual
20 knowledge that the store contained architectural barriers. Plaintiff is better suited to answer these
21 types of questions. Therefore, plaintiff's motion to compel both defendants Kelly Moore and trustees
22 to answer Interrogatory No. 6, is denied.

23 As to Interrogatories Nos. 13 and 14, defendant Kelly Moore states both of these
24 interrogatories have been answered and are not at issue in this discovery disagreement. Defendant
25 trustees does not address Interrogatories Nos. 13 and 14. Moreover, the language of these
26 interrogatories is not included in either of the discovery disagreement statements. Therefore, the
27 court finds that plaintiff's motion to compel does not include Interrogatories Nos. 13 and 14.

28 ///

1 IV. PRODUCTION REQUESTS

2 Pursuant to Fed. R. Civ. P. 34(a), a party may request from a party production of
3 documents which are in the possession, custody or control of the party served. “Control is defined
4 as the legal right to obtain documents upon demand.” United States v. Int’l. Union of Petroleum and
5 Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989), citing Searock v. Stripling, 736 F.2d
6 650, 653 (11th Cir.1984). Although requests must be addressed to a party, they may seek documents
7 possessed by a non-party if the party “controls” the non-party. The dispositive issue is the actual
8 working relationship between the entities. The moving party has the burden to prove that the
9 opposing party has legal control over the documents. Id., citing Norman v. Young, 422 F.2d 470,
10 472-73 (10th Cir.1970).

11 SET ONE

12 As to Request No. 1, the motion to compel defendant trustees to provide further
13 response is denied. Defendant trustees declare that they have produced all the documents relevant
14 to Request No. 1.

15 As to Request No. 2, the motion to compel defendant trustees to provide further
16 response is denied. Defendant trustees declares that after a reasonable search, they did not find any
17 documents responsive to this request. Moreover, plaintiff has equal access to “local, state and federal
18 codes.”

19 As to Request No. 3, the motion to compel defendant trustees to provide further
20 response is denied as defendants produced all documents in their possession or control.

21 As to Request Nos. 4, 5, and 11, defendant trustees assert that these documents are
22 protected by attorney-client privilege and the work product doctrine.

23 The federal work product doctrine protects from discovery documents and tangible
24 things that have been prepared by or for a party or his representative in anticipation of litigation or
25 for trial. Fed. R. Civ. P. 26(b)(3). Its purpose is “to prevent exploitation of a party’s efforts in
26 preparing for litigation.” Admiral Ins. Co. V. United States District Court, 881 F.2d 1486, 1494 (9th
27 Cir. 1989). A party seeking opinion work product must show more than a substantial need or undue
28 hardship. Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992). However,

1 a party may be able to discover facts derived from an attorney's investigation if that party
2 demonstrates a substantial need for it and an inability to obtain it by other means without undue
3 hardship. Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3rd Cir. 1994); Admiral
4 Insurance Co. v. U.S. Dist. Court for Dist. of Arizona, 881 F.2d 1486, 1494 (9th Cir. 1989).

5 Moreover, a party asserting attorney-client privilege must provide the reasons for the
6 objection. Fed. R. Civ. P. 34(b). A blanket claim of attorney-client privilege is insufficient. Some
7 courts have begun the practice of requiring the objecting party to submit an index or list of the
8 privileged documents, authors, recipients, and more. "A proper assertion of the Fifth Amendment
9 privilege requires, at a minimum a good faith effort to provide the trial judge with sufficient
10 information from which he can make an intelligent evaluation of the claim." Davis v. Fendler, 650
11 F.2d 154, 1160 (9th Cir. 1981).

12 In the present case, defendant trustees agreed to provide a privilege log as requested
13 by plaintiff. The privilege log should provide the general nature of the privileged document, the
14 identity and position of its author, the date it was written, the identity and possession of all addresses
15 and recipients, the documents present location and the reason it is being withheld. The privilege log
16 should have been provided with the parties' statements of discovery disagreement. The court is
17 obviously concerned with the fast approaching discovery deadline of August 15, 2005. Therefore,
18 defendant trustees are ordered to provide the court with all relevant privilege logs within seven days
19 after service of this order. The court will abstain from ruling on Request Nos. 4, 5, and 11, until
20 provided with a privilege log.

21 As to Request No. 6, plaintiff's motion to compel is granted. Defendant trustees
22 declare that they have complied with this request. Defendant trustees should have provided a much
23 more specific response describing when and what they discovered to the plaintiff.

24 As to Request No. 7, defendant trustees assert that they do not have any documents
25 that comply with this request. Therefore, plaintiff's motion to compel response is denied.

26 As to Request No. 8, plaintiff's motion to compel is granted. Defendant Kelly Moore
27 has also agreed to produce these documents.

28 As to Request Nos. 10 and 15, defendant Kelly Moore asserts that it will produce

1 documents responsive to this request. However, presumably to preserve its objection, defendant
2 Kelly Moore asserts that this request violates attorney-client privilege and attorney work product
3 doctrine. As stated above, defendant Kelly Moore must provide the court with a privilege log when
4 making such objections. If Kelly Moore intends on preserving its attorney client privilege/work
5 product, it must provide the court with a privilege log (as described above) within seven days of
6 service of this order.

7 Nonetheless, Kelly Moore has also agreed to produce the documents responsive to this
8 request. Therefore, if Kelly Moore does not provide the court with a privilege log, plaintiff's motion
9 to compel is granted, as to Request Nos. 10 and 15.

10 As to Request Nos. 12 and 13, defendant trustees declare they do not the requisite
11 documents. Plaintiff asserts that "[i]t defies common sense to expect Kelly Moore has no financial
12 statements, photos or videos of their store, lease agreements, permits, or plans for the store." (Joint
13 Statement Re: Discovery Disagreements, Pg. 6.) However, it is defendant trustees who object to the
14 request. Moreover, plaintiff does not provide any reason why defendants should be disbelieved.
15 Therefore, plaintiff's motion to compel further response to request No. 12 is denied.

16 V. SITE INSPECTION (Request for the Production of Documents, Set Two, Request No. 17)

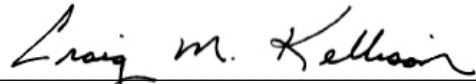
17 As to Request No. 17, plaintiff's motion to compel is granted. On June 22, 2005, all
18 parties agreed to complete the site inspection prior to the discovery deadline of August 15, 2005.
19 However, the court is unaware of whether the site inspection has been completed, yet.

20 VI. CONCLUSION

21 Accordingly, IT IS HEREBY ORDERED that plaintiff's motion to compel discovery,
22 filed May 2, 2005; is granted in part and denied in part, in accordance with the terms of this order.

23 IT IS FURTHER ORDERED that no monetary sanctions or costs be imposed. Both
24 parties are equally culpable in the inadequacies of their discovery processes.

1 DATED: July 22, 2005.

2
3 

4 **CRAIG M. KELLISON**
5 UNITED STATES MAGISTRATE JUDGE
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28